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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-3121

GEORGE EDWARD SMITH, JR.,
Petitioner,

vs.

STATE OF WISCONSIN.

---

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

---

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# INDEX


| | Page |
|---|---|
| OPINION BELOW | 2 |
| JURISDICTION | 2 |
| QUESTIONS PRESENTED | 2 |
| CONSTITUTIONAL PROVISIONS INVOLVED | 3 |
| STATEMENT | 3 |
| DENIAL OF DUE PROCESS AND FAIR TRIAL | 7 |
| RIGHT TO RESIST AN UNLAWFUL ARREST | 9 |
| SPECIFICATION OF ERRORS TO BE URGED | 14 |
| REASONS FOR GRANTING THE WRIT | 15 |
| CONCLUSION | 16 |
| APPENDIX "A" | 19 |
| APPENDIX "B" | 20 |
| APPENDIX "C" | 20 |

Page

## AUTHORITIES

Constitution of the United States:

First Amendment ..... 3

Fourth Amendment ..... 3

Fifth Amendment ..... 3

Fourteenth Amendment ..... 3

## CASES CITED

Bachellar vs. Maryland
397 U.S. 564, 90 S. Ct. 1312,
25 L. E. (2nd) 570 ..... 13

Giles vs. United States
284 F. 208, 214 ..... 16

Henry vs. United States (1959)
361 U.S. 98, 102, 80 S. Ct. 168,
4 L. E. (2nd) 134 ..... 9

Richard Mayberry vs. State of
Pennsylvania
Section 3, Volume 8, Criminal
Law Reporter, page 3068 ..... 8

People vs. Spinosa
252 Pa. (2nd) 409 ..... 9

State vs. Mobley (1954)
240 N. C. 476, 83 S. E. (2nd) 100 ..... 9

Page

Tenz vs. Ohio (1968)
392 U.S. 1, 16, 88 Sup. Ct. 1868,
20 L. E. (2nd) 889 ..... 9

Wong Sung vs. U.S. (1962)
371 U.S. 471, 479, 83 Sup. Ct.
407, 9 L. E. (2nd) 441 ..... 9

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

George Edward Smith, Jr. prays that a writ of certiorari issue to review the Judgment of the Supreme Court of the State of Wisconsin, affirming a violation of Section 946.41 (1) of the Wisconsin Statutes, "resisting arrest" and from the judgment denying petitioner's petition for rehearing thereon, as the conviction of disorderly conduct was reversed.

## OPINION BELOW

The Trial Court denies petitioner's motions after verdict on the verdict of guilty rendered and did not render an opinion except in the order denying petitioner's motions after verdict. The opinion of the Supreme Court of Wisconsin, reversing the conviction for failure of the complaint to show probable cause, was by a unanimous Court and the opinion of the Supreme Court affirming the conviction upon "the resisting arrest" charge was by a divided court of 4 to 3.

The opinion of the Supreme Court is reported in 50 Wis. (2nd) 460, 184 N. W. (2nd) 889, as Appendix C.

## JURISDICTION

The opinion of the Supreme Court of Wisconsin is dated March 30, 1971 and shown as Appendix C. The petition for rehearing was timely filed and was denied June 2, 1971. The jurisdiction of this Court is invoked under Section 1257 (3) of the United States Code.

## QUESTIONS PRESENTED

1. In view of the United States Constitution, Fourth Amendment, requiring the State to show probable cause, did a mere unsupported conclusion of the Statute show probable cause?

2. Was defendant and petitioner denied due process of law when the sovereign State of Wisconsin conceded the argument and the Supreme Court reversed it?

3. Was the petitioner denied due process of law when he was held in contempt of Court in front of the jury and a penalty imposed while the jury was present? Was due process denied?

## CONSTITUTIONAL PROVISIONS INVOLVED

This case relies on the First Amendment to the United States Constitution, the Fourth Amendment to the United States Constitution, the Fifth Amendment to the United States Constitution and the Fourteenth Amendment to the United States Constitution, reproduced in Appendix "C".

## STATEMENT

Petitioner is an attorney in the City of Janesville, Rock County, Wisconsin, and on March 5, 1969 appeared in County Court of Rock County, Branch Number Two, at Janesville, preparatory to conducting a preliminary hearing on a charge against his client for sodomy involving a young woman.

The facts are as follows:

On March 5, 1969 the defendant, a Janesville attorney, was in the Court Room of the Rock County Court House in Janesville, preparatory to representing a client at a preliminary hearing on a charge of sodomy. Two of the witnesses for the State were Officer Norman E. Pierce and Captain Gerald Dilley of the Rock County Sheriff's Department.

Shortly after 2:00 P. M. an altercation occurred between the officers and defendant Smith. There is some dispute with respect to what was said.

Officer Pierce testified that he was seated by himself at the front of the court room when defendant entered, sat down at the counsel table and then turned to Pierce and asked: "Are you the complainant in this matter?" When he did not respond, defendant then said: "Did you give my client a blow job?"

The defendant again turned to Officer Pierce and asked: "Are you the complainant?" The officers then jumped to their feet and Officer Pierce, by his own admission at trial, told defendant that if defendant again said what he had previously said to him "I would knock him on his ass."

Defendant denied use of this language towards the officers, stating that he said "they must have done a snow job to get this particular statement," referring to the obtaining of a written confession from his client.

The preliminary of defendant's client was then held, conducted by a court commissioner, George Blakely. At this preliminary Captain Dilley testified and was cross-examined by the defendant. At the conclusion of the hearing, the two officers approached defendant and advised him he was under arrest for disorderly conduct. Defendant refused to go along with the officers and when the officers advanced toward him, defendant verbally protested the arrest and asked to be arraigned and to post bond. The officers did not have a warrant during the incident, which took place in full view of the county judge, the court commissioner, the court reporter, the assistant district attorney, and defendant's client. Defendant was subsequently charged with disorderly conduct and resisting arrest.

Later that afternoon defendant was arraigned on these charges in Rock County Court, the Honorable Mark Farnum presiding, at which time a complaint was served on defendant which read:

> "Norman Pierce being duly sworn says that on the 5th day of March, 1969, at the City of Janesville, in said County of Rock and State of Wisconsin
>
> Count One
>
> 'The said George Edward Smith, Jr. did unlawfully, in a public place, engage in indecent and otherwise disorderly conduct, under circumstances tending to cause a disturbance, contrary to Section 947.01 (1) of the Wisconsin Statutes; and
>
> Count Two
>
> 'That on the 5th day of March, 1969, . . . did unlawfully and knowingly resist an officer while such officer was doing an act in his official capacity and with lawful authority, contrary to Section 946.41 (1) of the Wisconsin Statutes; all against the peace and dignity of the State of Wisconsin and prays that the said George Edward Smith, Jr. may be arrested and dealt with according to law.' "

Objections were then made to the form and the substance of this complaint and that it (did) not recite facts sufficient to establish probable cause.

Trial was held before a jury on April 10 and 11, 1969 and defendant was found guilty as charged.

Defendant was fined $75 on the disorderly conduct charge; on the charge of resisting arrest, defendant was fined $500 and sentenced to one year in the county jail, with sentence stayed as to defendant placed on probation for one year; fines were to be paid within twenty days, and defendant was to be confined in the county jail for four nights from 6:00 P. M. until 6:00 A. M. during the first thirty days. Defendant was also ordered to pay all costs, including the legal fees of the special prosecutor. After the fines were paid, a stay was granted pending appeal.

At the time of the arrest, as it appears above, no order had been entered for a warrant for arrest and no warrant was in existence and at the time of the arrest in the Court Room of County Court Branch Number Two, the officers took defendant by his arms and told him he was under arrest for disorderly conduct and was taken over his objections and dragging feet, expressing his demand to be taken before a Magistrate for immediate arraignment, and that bond be set. At this time there was present in the Court Room Judge John J. Boyle and the Circuit Court Commissioner who had heard the preliminary examination in the case for which Mr. Smith was present.

Over these protests the defendant was literally forcibly walked to the County Jail where the usual finger printing, photographing and processing took place. Thereafter, some three hours later, defendant was taken to County Court Branch Number Four in Beloit, for arraignment and where the complaint was read to the defendant charging the two counts, aforementioned, of disorderly conduct and resisting arrest. Objections were entered to the

form of the complaint and to the substance of the complaint. Defendant was then released on his own recognizance.

The Supreme Court ruled that the defendant had not waived his objections to the form or substance of the complaint.

The Supreme Court ruled unanimously that the complaint of disorderly conduct failed because it did not state probable cause.

On the resisting arrest charge, although the state conceded on oral argument that the entire complaint was deficient, the majority ruled, 4 to 3, that the complaint was not insufficient as to the charge of resisting arrest and that the statement of the charges in statutory language is sufficient.

## DENIAL OF DUE PROCESS AND FAIR TRIAL

During the course of the trial the Trial Judge held the defendant in contempt and sentenced him summarily from the bench. The contempt resulted from the following question and answer:

> "Q. You were able by exerting this strength to prevent two men from handcuffing you, is that right?
>
> "A. It wasn't accomplished, that is a fact."

The matter was then reviewed and dragged out by the Court over the objection of counsel.

The contempt was for failure to answer that question yes or no. Previous to this question there

was no discussion of the amount of strength used or how it was exerted. This is a double barrel question and cannot be answered yes or no.

By the Court imposing a contempt for failing to answer a question yes or no that cannot be answered yes or no, the Court substantially prejudiced the right of the defendant. By imposing this contempt finding and by imposing a penalty in front of the jury, the Court clearly prejudiced the defendant at the trial.

In the case of Richard Mayberry vs. State of Pennsylvania, in an opinion delivered January 20, 1971, cited in Section 3, Volume 8 of The Criminal Law Reporter, at page 3068, the Court held as follows:

> Our conclusion is that by reason of the Due Process Clause of the Fourteenth Amendment, a defendant in criminal contempt proceedings should be given a public trial before a judge other than the one reviled by the contemnor.

Obviously, in the case before the bar, the proper procedure would have been to excuse the jury and cautioned the defendant and then referred the matter to another judge for further proceedings, outside the presence of the jury. Not only did the Judge in the presence of the jury personally sentence the defendant but indicated that he had to answer that question yes or no.

Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer.

At no time was the defendant's conduct disruptive, recalcirart or disrespectful. At no time did the defendant insult the integrity of the Judge or the Court or attack the Judge or the Court in any way.

## RIGHT TO RESIST AN UNLAWFUL ARREST

The crime of resisting arrest requires proof that an officer was doing an act in his official capacity and with lawful authority. A lawful arrest under this statute is a condition precedent to the establishment of the charge of resisting arrest. In State vs. Mobley (1954) 240 N. C. 476, 83 S. E. (2nd) 100, the Court points up that the offense of resisting arrest both at common law and under the statute, presupposes a lawful arrest. In no event, may a conviction of the offense of resisting arrest be predicated on resistance of an unlawful arrest.

An officer making an unlawful arrest is not engaged in the proper discharge of his duties and could be resisted by reasonable force.

People vs. Spinosa, 252 Pennsylvania (2nd) 409
Jackson vs. Supreme Court, 219 Pennsylvania (2nd) 409.

An arrest is a seizure and an arrest without a warrant or probable cause is unreasonable, within the purview of the Fourth Amendment.

Tenz vs. Ohio (1968) 392 U.S. 1, 16, 88 Sup. Ct. 1868, 20 L. E. (2nd) 889,
Wong Sung vs. U.S. (1962) 371 U.S. 471, 479, 83 Sup. Ct. 407, 9 L. E. (2nd) 441
Henry vs. U.S. (1959) 361 U.S. 98, 102, 80 S. Ct. 168, 4 L. E. (2nd) 134.

The rule as to the right to resist an unlawful arrest is stated in 5 American Jurisprudence (2nd), Arrest, Section 94, P.P. 778-780, as follows:

> "Any unlawful interference with the fundamental right of personal liberty may be resisted. Accordingly, every person has a right to resist an unlawful arrest . . . And one who has been illegally arrested is generally held justified in effecting his escape...
>
> "In exercising the right to resist an unlawful arrest, a person may use such reasonable force as is necessary to prevent the arrest. An illegal arrest is an assault and battery, and generally a person has the same right to use force in defending himself from an unlawful arrest as he would have in repelling any other assault and battery, but the right is not unlimited. Rightful resistance is generally limited to the same degree of force as is employed in making the arrest. And the force used must be proportionate to the threatened injury. . ."

Under the standard as set forth in the American Jurisprudence quotation, Attorney George Edward Smith, Jr., had the right to resist the unlawful arrest. The requirement of a lawful arrest as a condition precedent to a resisting arrest charge is made clear in the very language of Section 946.41 (1) which requires that the officer be acting with lawful authority. We submit that under the evidence, Attorney Smith used reasonable force in attempting to resist the arrest. We also submit that there is no evidence on the record to show that the officers were acting with lawful authority when they made the arrest.

We submit further that the charge of resisting arrest and the conviction thereon should be reversed because of the failure of the State to prove that the officers were acting with lawful authority. At the very least, a new trial on the resisting arrest charge should be ordered. The trial judge's ruling that the arrest was lawful as a matter of law created errors in the proceeding which permeated their fundamental fairness. All instructions given in connection with the charge of resisting arrest did not make an issue of whether the arrest was lawful. Instructions requested by the defense inquiring into the lawfulness of the arrest were not allowed. Additionally, if the arrest was unlawful, the defendant had a right to resist it and the charge of resisting arrest should have been dismissed. Thus, material and prejudicial error to the defense was committed by the trial judge in his holding that the arrest was lawful as a matter of law.

The Supreme Court of Wisconsin erred in sustaining petitioner's conviction of resisting arrest.

Such resistance as the state claims was merely an effort for petitioner to be brought before the magistrate as was his right if this was a valid arrest for the determination of bond.

In the instructions given by the trial court, the Court stated:

> "The second element of this offense requires that the officer was doing an act in his official capacity and with lawful authority."

If you find, therefore, beyond a reasonable doubt that the detective, Norman Pierce, was in the

act of arresting the defendant, then you should also find that he was acting in his official capacity and with lawful authority.

The words "you should also find that he, the officer, was acting in his official capacity and with lawful authority," virtually constitutes and does constitute a directed verdict for the state, contrary to due process.

The Court further instructed the jury that the language used: "did you give my client a blow job" can constitute indecent or--and abusive language which is likely to result in a breach of the peace... You will have to determine whether the defendant Smith made that remark and if so, did the language used constitute indecent or obscene language in violation of the Disorderly Conduct Statute.

After the jury had retired that jury sent word through the plaintiff, asking for further instructions on what constitutes disorderly conduct.

The court then stated in presence of the jury: "I cannot answer this question in any other way than re-read the instructions pertaining to disorderly conduct." The Court then re-read the complaint and the disorderly conduct statutes 947.01 (1) "disorderly conduct as defined by Section 947.01 (1) of the Criminal Code of Wisconsin is committed by one who in a public or private place engages in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance."

After giving additional instructions the Court concluded its instructions on the following language:

"There is another statement I want to repeat also. In the case before us, the comment - did you give my client a blow job - can constitute indecent and abusive language, which is likely to result in a breach of the peace."

It is to be noted that the Court at one time referred to obscene language and at another time referred to simply indecent and abusive language.

As a consequence it is not clear from the finding of the jury whether the defendant was found guilty of using obscene language, indecent language or of otherwise disorderly conduct.

In view of the confusing instructions of the Court, we do not know of what particular conduct the defendant was found guilty by the jury as it could have been any one of several matters, including otherwise disorderly conduct in the language of the Statutes.

This amounts to a virtual directed verdict, invades the province of the jury and denied petitioner due process.

As was stated in Bachellar vs. Maryland, 397 U.S. 564, 90 Sup. Ct. 1312, 25 L. E. (2nd) 570, "The necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid, under the Federal Constitution, the conviction cannot be upheld."

There are numerous incidents throughout the trial wherein the judge threatened counsel and petitioner with findings of contempt, all in the

presence of the jury, and in fact did find petitioner guilty of contempt and imposed a fine in the presence of the jury which he later vacated.

The language charged to the defendant is privileged under the First Amendment to the Constitution of the United States and under the State Constitution of the State of Wisconsin and by virtue of the Fourteenth Amendment to the United States Constitution.

## SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of the State of Wisconsin erred:

1. In stating that the complaint did not have to state evidentiary facts or be based upon personal knowledge, and does show probable cause.

2. In failing to grant the concession of the sovereign State of Wisconsin that count two of the complaint failed to show probable cause and even though the state conceded this, nevertheless up-held the conviction of count two.

3. In failing to reverse the conviction and affirming the trial court's ruling and not granting a mistrial even though the defendant was prejudiced and held in contempt of Court and sentenced for such contempt in the presence of the jury; even though the Trial Judge later reversed the contempt finding and forgave the fine, not in the presence of the jury, but did not inform the jury.

4. In failing to grant a new trial for giving a directed verdict on the instructions to the jury.

5. Due process was denied when the right to resist an unlawful arrest was not considered.

## REASONS FOR GRANTING THE WRIT

It is clear that only the conclusions of the officers are shown. No facts or personal knowledge is presented for the Court or Magistrate to make an impartial determination of the facts. Although the United States Constitution requires that the complaint state the essential facts, this complaint states no facts at all. It merely outlines the conclusion of an officer that the petitioner did "unlawfully and knowingly resist an officer while such officer was doing an act in his official capacity and with lawful authority."

No probable cause is shown and no facts are set forth for the magistrate to make an impartial determination.

The State conceded that the complaint failed to show probable cause, as is noted in the opinion of the Wisconsin Supreme Court. Yet the Court on a 4 to 3 vote refused to grant a reversal on this basis. This is a complete denial of due process.

Count one was set aside on this very basis unanimously, yet count two was not set aside. Clearly this is a denial of due process.

If such a complaint establishes probable cause, the magistrate interposed between the citizen and the police by the Fourth Amendment (McDonald vs. United States, 335 U.S. 451, 455) need only place his formal imprimatur upon police findings of probable cause. No probable cause need appear from

the complaint, as required by Rule 4 (a), Federal Rules of Criminal Procedure. All discretion is vested in the police. "This is a very dangerous amalgamation of powers." Giles vs. United States, 284 F. 208, 214, cited with approval in the dissenting opinion below, 241 F. 2nd at 581.

## CONCLUSION

For these reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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# APPENDIX

# APPENDIX "A"

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech. . . . ."

The Fourth Amendment to the United States Constitution provides:

> ". . . and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . ."

The Fifth Amendment to the United States Constitution provides:

> ". . . nor be deprived of life, liberty, or property, without due process of law . . ."

The Fourteenth Amendment to the United States Constitution provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## APPENDIX "B"

The Supreme Court of the State of Wisconsin denied a rehearing without an opinion on June 2, 1971.

## APPENDIX "C"

The Supreme Court of Wisconsin opinion of March 30, 1971 in the case below:

WILKIE, J. The first issue presented on this appeal is whether the complaint is sufficient on both counts. In order to reach this issue we must first determine whether, as the state contends, defendant waived his objections to the sufficiency of the complaint. We think not.

Defendant was arraigned before Judge Farnum at 5:50 p. m. on the day of his arrest. At this proceeding the complaint was read to defendant, and the record notes that defendant had been given a written copy thereof. Defendant then entered an objection "to the form of the complaint and the substance of the complaint," citing Massen v. State,[1] which requires objections of this nature to be entered at the earliest possible stage.

The court then asked:

"Court: You mean because it's a bare bones complaint in the common vernacular, rather than the lengthy factual affidavit?

"Mr. Kinast: Yes, it does not recite facts sufficient to establish--
"[ Interruption by the prosecutor.] "

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[1] (1969), 41 Wis. 2d 245, 163 N.W. 2d 616.

After some discussion of bail:

> "Mr. Kinast: . . . So that it is clear on the record that there has been an objection to the form and the substance of the process by which the defendant is brought here before the court and is now appearing, I make this objection once again informally. Now, then and I move at this time for the immediate release of the defendant. As I understand it, Judge, that motion is about to be denied, assuming that the court wants to get on with the --
>
> "Court: Well, yes, the court will deny the motion on the grounds that it's made for the immediate release of the defendant. . . ."

After further discussion of whether to set bond, defense counsel stated:

> "Mr. Kinast: Judge, as I understand it, then, I keep harping on this, for the record the motion of counsel to release the defendant from custody on the grounds that the process and pleadings, substance and form, do not support the jurisdiction of the court, is denied?
>
> "Court: Yes, right."

Thereafter the case was continued until March 11, 1969, to be heard before Judge Boyle, under the assumption that there would be a substitute judge. No plea was entered. At the close of the proceeding, another defense counsel stated:

> "Mr. Fisher: There is no waiver here of our right to renew our motions.

"Court: Absolutely not.

"Mr. Fisher: Showing probable cause on the complaint.

"Court: Absolutely not."

At the hearing on March 11, 1969, before Judge Boyle, the court advised defendant and counsel that he had referred the matter to the court administrator, and that Judge Clarence Traeger of Dodge county had been assigned to hear the matter on March 13, 1969. Any motions were to be made at that time.

At the hearing on March 13, 1969, before Judge Traeger, defendant entered a not guilty plea and requested a 12-man jury trial. At this hearing defendant moved to:

a. Quash the arrest made without a warrant on the grounds that (1) "there was no probable cause for such arrest in that . . . the officers had no reasonable grounds to believe . . ." that defendant could not later be apprehended or that personal or property damage was likely (relying on sec. 954.03(1), Stats.[2]); and (2) defendant was privileged from arrest since he was representing his client at a judicial proceeding in the courtroom;

b. "quash the complaint and warrant issued for the reason that at the time of said arrest . . ." defendant was "privileged from arrest" under the circumstances. (Emphasis added.)

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[2] This statute was repealed by the New Criminal Code: ch. 255, sec. 55, Laws of 1969.

c. "[Q]uash the complaint and warrant for there was no showing of probable cause made before any court or magistrate prior to or at the issuance of the said complaint and warrant for the arrest of the defendant for there was no showing that the arresting officers had reasonable grounds to believe that the defendant . . . if he had committed a misdemeanor . . ." could not later be apprehended or that personal or property damage would result if defendant were not immediately arrested. The affidavit also appears to challenge the arrest.

The state argues that this motion and affidavit challenge only the arrest, and that a failure to challenge the sufficiency of the complaint and the court's jurisdiction to proceed further, constitutes a waiver. The trial court (Judge Traeger) obviously construed this motion as a challenge to the arrest as did the state. Defendant requested a formal hearing on the motion but in no way objected to the court's interpretation of it. Defendant made no further objection to the sufficiency of the complaint before entering his plea.

Although the motion to quash entered before Judge Traeger on March 13, 1969, clearly appears to challenge the arrest of defendant, this does not dispose of the objections entered at defendant's initial appearance before Judge Farnum on March 5, 1969. These objections were directed to the "form and substance" of the complaint, and to the "jurisdiction of the court." A motion to release defendant on these grounds was denied. The question is whether this was an adequate challenge to the sufficiency of the complaint. We think so.

Judge Farnum apparently viewed the challenge to the complaint as based on sufficiency grounds

and denied defendant's motion. There would be no reason, then, for requiring defendant to raise the matter again. The defendant has not waived his objections to the form and substance of the complaint.

As to the sufficiency of the complaint, we must examine both counts as against the challenge. The entire court is unanimously satisfied that the complaint as to the disorderly conduct charge (count one) fails because it does not state probable cause, i.e., it omits the essential facts constituting the offense charged.[3]

Despite the fact that the state conceded on oral argument that the entire complaint was deficient, if the court reached that question, the majority of the court are of the view that the complaint is not insufficient insofar as the charge of resisting arrest (count two) is concerned. That count reads:

> "That on the 5th day of March, 1969, at the city of Janesville, in said county of Rock and state of Wisconsin, the said George Edward Smith, Jr., did unlawfully and knowingly resist an officer while such officer was doing an act in his official capacity and with lawful authority, contrary to section 946.41(1) of the Wisconsin statutes; all against the peace and dignity of the state of Wisconsin and prays that the said George Edward Smith, Jr., may be arrested and dealt with according to law."

A majority of the court conclude that with respect to this type of offense, the charge as stated

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[3] State v. Williams (1970), 47 Wis. 2d 242, 253, 177 N.W. 2d 611.

in statutory language is sufficient and that no further facts are necessary. A minority of three of the court, including the writer of this opinion, Mr. Justice Heffernan, and one other member, consider count two of the complaint insufficient for the identical reason the complaint is deemed insufficient under the count for disorderly conduct. The court therefore concludes that the complaint is insufficient as to count one but sufficient as to count two.

The second issue presented on this appeal concerns defendant's conviction under the resisting arrest count: whether the trial court erred in ruling as a matter of law that the arrest for a misdemeanor committed in the officers' presence was lawful.

The common law rule with respect to warrantless arrests for misdemeanors committed in an officer's presence is that the offense must constitute a breach of the peace.[4]

Wisconsin case law is to the effect, however, that a misdemeanor need not constitute a breach of the peace in order to justify an arrest without a warrant when the offense is committed in the officer's presence. The cases[5] cited by the defendant which contain language to the contrary all involve offenses not committed in the officer's presence,

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4 5 Am. Jur. 2d, Arrests, p. 718, sec. 28.

5 Stittgen v. Rundle (1898), 99 Wis. 78, 74 N.W. 536, cited with approval in Gunderson v. Struebing (1905), 125 Wis. 173, 104 N.W. 149, and Allen v. State (1924), 183 Wis. 323, 197 N.W. 808.

a fact this court noted in Radloff v. National Food Stores, Inc.[6]

Other cases involving a warrantless arrest for a misdemeanor committed in the officer's presence have consistently upheld the authority of the officer in such situations:

In Hawkins v. Lutton,[7] which involved the arrest, without a warrant of an inmate of a disorderly house, the court, in upholding the arrest, stated:

> ". . . The[officers] . . . had a right at common law to arrest all persons who were guilty of a breach of the peace, or other violation of the criminal laws, in their presence; but in all such cases the arrest must be made at the time of the offense, or immediately after its commission."[8] (Emphasis added.)

In Edwards v. State,[9] however, there was clearly no breach of the peace involved. There the police entered an apartment where they found the

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[6] (1963), 20 Wis. 2d 224, 237a, note 2, 121 N.W. 2d 865, 123 N.W. 2d 570.

[7] (1897), 95 Wis. 492, 70 N.W. 483.

[8] Id. at pages 498, 499. It should perhaps be noted that this case involved a breach of the peace, however, since the police officers "had heard the disturbance and disorderly conduct from the outside of the house . . ." (id. at page 499), although this comment was directed to whether the offense was committed in the officers' presence.

[9] (1926), 190 Wis. 229, 208 N.W. 876.

defendant and another engaged in an act of sodomy. In upholding the arrest without a warrant the court noted:

> "It is too well settled to require the citation of authority that an officer may arrest one committing a crime in his presence, whether it be a misdemeanor or a felony."[10]

In Mantei v. State[11] the court reaffirmed its holding in Edwards,[12] although it subsequently held that the search incident to this legal arrest went beyond permissible limits under the particular circumstances involved.

Similarly, Gray v. State[13] and State ex rel. Tessler v. Kubiak[14] upheld searches incident to legal arrests, which arrests were without warrants for misdemeanors committed in the officer's presence. Both of these decisions did not even question the legality of the arrests.

Sec. 954.03(1), Stats., authorizing arrest without a warrant, which was in force at the time defendant was arrested, provided:

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[10] Id. at page 231.

[11] (1932), 210 Wis. 1, 245 N.W. 683.

[12] Id. at page 4.

[13] (1943), 243 Wis. 57, 9 N.W. 2d 68 (vagrancy, search led to charge of burglary).

[14] (1950), 257 Wis. 159, 42 N.W. 2d 496 (operation of motor vehicle without a driver's license, search led to charge of burglary).

> "Arrest without warrant. (1) When Lawful. An arrest by a peace officer without a warrant for a misdemeanor or for the violation of an ordinance is lawful whenever the officer has reasonable grounds to believe that the person to be arrested has committed a misdemeanor or has violated an ordinance and will not be apprehended unless immediately arrested or that personal or property damage may likely be done unless immediately arrested. This subsection is supplemental to s. 62.09 (13) and shall not in any way limit any powers to arrest granted by that section."[15]

The defendant and the state are in dispute over the meaning of this statute. The state contends that this section, sec. 954.03 (1), Stats., applies only to misdemeanors not committed in the officer's presence. In an attorney general's opinion,[16] the following is stated:

> "In order to determine whether an arrest should be made without a warrant for a misdemeanor not committed in his presence in a specific case, these tests [of sec. 954.03 (1), Stats.] must be applied to the specific fact situation."[17]

This opinion is entitled to great weight[18] especially in view of the fact that the legislature declined to

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15 Sec. 62.09 (13), Stats., applies to city police officers.

16 45 Op. Atty. Gen. (1956) 289.

17 Id. at page 290.

18 See Union Free High School District of Montfort v. Union Free High School District of Cobb

make any revision in the law in this respect until 1969 when the statute was repealed in a major revision of the criminal procedure Code. We conclude in Wisconsin an officer is permitted to make an arrest for any misdemeanor committed in his presence and without regard to whether the violation constitutes a breach of the peace.

We have considered all of the other arguments advanced by the defendant pointing to alleged errors of the trial court in connection with the conviction on the resisting-arrest charge and find them without merit.

By the Court. -- Judgment affirmed as to conviction on resisting arrest count, and reversed as to conviction on disorderly conduct count.

(1934), 216 Wis. 102, 106, 256 N.W. 788. See also: Wisconsin Valley Improvement Co. v. Public Service Comm. (1960), 9 Wis. 2d 606, 616, 617, 101 N.W. 2d 798; State ex rel. West Allis v. Dieringer (1957), 275 Wis. 208, 219, 220, 81 N.W. 2d 533.

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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-312

GEORGE EDWARD SMITH, JR.,
*Petitioner,*

*v.*

STATE OF WISCONSIN,
*Respondent.*

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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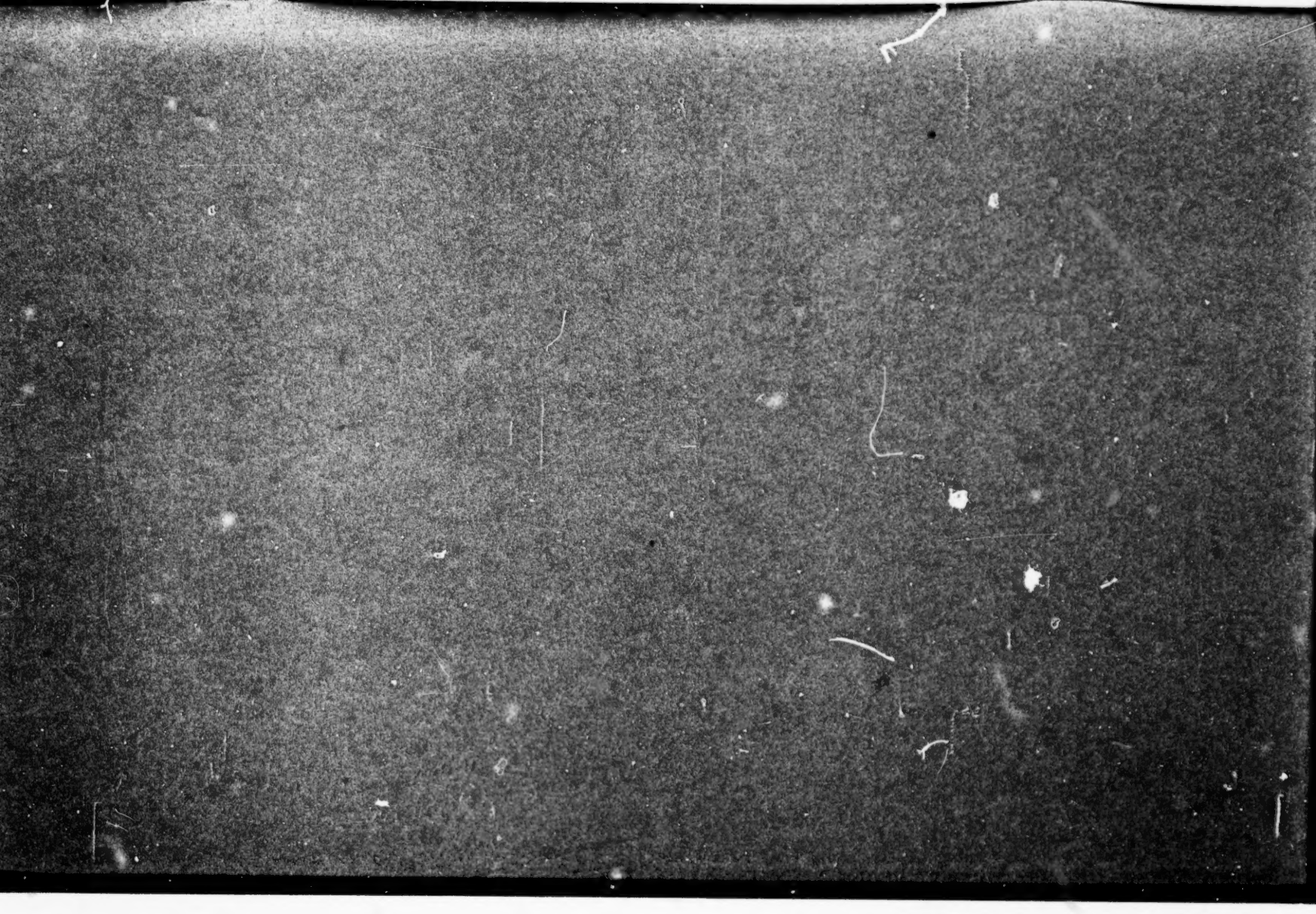

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## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### JURISDICTION

The petitioner raised no federal question, substantial or otherwise, either in the trial court or in the Wisconsin Supreme Court. Such questions are raised for the first time in the petition for writ of certiorari, which the Court cannot now consider. *Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161, 22 L.ed. 2d 398 (1969).

## STATEMENT OF THE CASE

At page 5 of the petition, the place of the alleged commission of the offense and petitioner's name are omitted from the statement of Count Two of the complaint. The count properly is:

> "That on the 5th day of March, 1969, at the City of Janesville, in said County of Rock and State of Wisconsin, the said George Edward Smith, Jr., did unlawfully," etc.

## ARGUMENT

All questions argued in the petition are neither of sufficient importance, founded upon a conflicting decision, affect others than the petitioner, nor based on incorrectness of the decision below. They are raised for the first time in the petition for the writ of certiorari, as above noted.

Petitioner apparently relies upon the Fourth Amendment in his assertion that the state must have shown probable cause in the complaint and that it failed to do so. But the amendment, in its pertinent part, states that ". . . no Warrants shall issue, but upon probable cause. . . ." No warrant was ever issued in the case because the petitioner, after a valid, warrantless arrest, appeared voluntarily before the magistrate, with counsel. No warrant was therefore required. *Pillsbury v. State*, 31 Wis. 2d 87, 142 N.W. 2d 187 (1966). No question of importance is presented in that regard.

The petitioner urges that he was denied due process because the decision below was contrary to the "concession" of the state that Count Two of the complaint would be insufficient if Count One were held fatally defective. With equal reason one might claim such denial in any case of reversal of a judgment

in his favor, or one entered upon an agreed fact statement. The court below was not foreclosed by a legal conclusion of the "conceding" party. Again, no important question is advanced, and the decision below is correct.

## CONCLUSION

For the above reasons, the petition for the writ should be denied.

Respectfully submitted,

ROBERT W. WARREN
*Attorney General of Wisconsin*

ROBERT D. MARTINSON
*Assistant Attorney General*

*Counsel for Respondent.*

November 22, 1971

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-312

GEORGE EDWARD SMITH, JR.,
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*v.*

STATE OF WISCONSIN,
*Respondent.*

## CERTIFICATE OF SERVICE

I hereby certify that on November 22, 1971, three copies of the foregoing Brief of Respondent were mailed, postage prepaid, to George E. Smith, Jr., Esq., 200 South Main Street, Janesville, Wisconsin 53545, counsel for the petitioner. I further certify that all parties required to be served have been served.

ROBERT D MARTINSON
*Assistant Attorney General*

Department of Justice
State Capitol
Madison, Wisconsin 53702

*Counsel for Respondent.*